TAN KIM HOR & ORS

v.

TAN HENG CHEW & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[COMPANIES WINDING-UP PETITION NO: D3-28-467-2002]
27 NOVEMBER 2002

COMPANY LAW: *Winding-up - Petition - Application for injunction under petition - Whether allowable - Whether injunction could not be ordered in the course of winding-up petition - Jurisdiction - Whether beyond jurisdiction of court to give injunctive orders unrelated to petition - Companies Act 1965 ss. 218, 221 - Rules of High Court 1980 O. 29 rr. 1, 2*

CIVIL PROCEDURE: *Action - Commencement - Petition for winding-up - Application for injunction under petition - Whether allowable - Whether constituted wrong mode of commencement - Rules of High Court 1980, O. 29 rr. 1, 1 - Companies Act 1965 s. 218, 221*

The petitioners and the 1st to 8th respondents were the shareholders of the 9th respondent company, Tan Chong Consolidated Sdn Bhd ('TCC'). TCC, in turn, is the controlling shareholder in four public listed companies including the 10th respondent ('Warisan'). As a result of misunderstandings that arose between the parties, the petitioners petitioned to wind-up TCC under s. 218 Companies Act 1965 ('the Act'). The petition was struck out by the High Court and the petitioners had since appealed to the Court of Appeal. Pending that, however, the petitioners filed the present petition seeking to again wind-up TCC on new and further grounds, and as an ancillary to the petition, applied by way of summons in chambers for an injunctive order that TCC appoint two proxies to represent the petitioners and the 1st to 8th respondents respectively at the EGM of Warisan. The issue was whether the court could in law, and upon consideration of s. 221 of the Act and O. 29 Rules of the High Court 1980 ('RHC'), grant the injunction sought for.

Held:

[1] This court had no powers to grant an injunction sought for by the petitioners under a winding-up petition. Neither the Act nor the Companies Winding-up Rules provide for interlocutory injunctions to be issued in the course of a winding-up proceeding. (p 478 c)

[2] The jurisdiction of the court on a hearing of a winding-up petition to make interim or other ancillary orders is governed by s. 221 of the Act. By the provisions of the section, the power given to the court, if at all, is limited to making ancillary orders in furtherance of or in connection with a winding-up order, such as appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition. The orders sought for in the present case were not in any way related to the prospective winding-up of TCC, and the court, clearly, is not empowered to make such orders. (p 478 f-g)

[3] The provisions in respect of applications for interlocutory injunctions are governed by O. 29 Rules of High Court 1980 ('RHC'). The application here, however, was filed under a winding-up petition, and that being so, upon the wordings of O. 29(2) RHC, only the provisions of the Act, and not the RHC, ought to apply to the petition. Thus, the question of lack of jurisdiction apart, the mode of commencing the present application was also wrong. On these two grounds alone the application could be dismissed *in limine.* (pp 478 h & 479 b)

[4] Even assuming that the court has the jurisdiction to consider the petitioners' application, the application would still be dismissed upon the principles laid down in *American Cynamid Co. v Ethicon Ltd* and *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors*, as the petitioners have not raised bona fide serious issues to be tried. The petitioners' complaint clearly did not relate to TCC at all, the company complained of being that of Warisan, in which TCC owned 42% of the shares. (p 479 c-d)

[5] The petitioners were filing the petition in their capacity as shareholders of TCC. However, upon the principles enunciated in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & Other Appeals*, no shareholder of Warisan could assert against the company any legitimate expectation to participate in the management of the company. It therefore follows that if TCC, as a shareholder of Warisan, could assert no such right against Warisan, the shareholders of TCC, including the petitioners, could definitely assert no such right. (p 480 c-d)

[Application dismissed.]

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(foll)***

Re RJ Jowsey Mining Co Ltd [1969] 2 OR 549 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd [1997] 2 CLJ 299 ***(refd)***

Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Others Appeals [1996] 1 CLJ 393 ***(foll)***

Legislation refered to:

Companies Act 1965, ss. 149(1), 181, 218(1)(i), 221(1)

Corporations Act (Canada), s. 258

Rules of the High Court 1980, O. 29 rr. 1, 2

For the petitioners - Dato' Shafee (Azhar Azizan); M/s Shafee & Co, Walter Pereira (Sharmaine Chow); M/s Kamarudin & Partners

For the 1st-9th respondents - Lim Kian Leong (Low Chi Cheng); M/s Lim Kian Leong & Co

For the 10th respondent - R Vinayaga (Wong Chee Lin); M/s Skrine & Co

Reported by WA Sharif

JUDGMENT

Zulkefli Ahmad Makinudin J:

Under this winding-up petition filed pursuant to s. 218(1)(i) of the Companies Act 1965 the petitioners apply by way of a summons in chambers (encl. 26) for an order:

(i) that the 9th respondent company, Tan Chong Consolidated Sdn Bhd ("TCC") through its directors, servants or agents be restrained from giving effect to any resolution appointing its Corporate Representative and that of its subsidiary, Parasand Ltd to the forthcoming Extraordinary General Meeting ("EGM") of the 10th respondent company, Warisan TC Holdings Bhd ("Warisan") to be held on 8 November 2002 and at any adjournment thereof, AND that,

(ii) TCC through its governing authority or its board of directors appoint 2 proxies, one proxy representing the petitioners' and the other representing the respondents' shareholding of the TCC and their proportionate interests in its subsidiary Parasand Ltd as TCC's and Parasand Ltd's proxies at the forthcoming Extraordinary General Meeting of Warisan to be held on 8 November 2002 and at any adjournment thereof;

With an alternative prayer to restrain TCC and its subsidiary Parasand Ltd from exercising its voting shares at the forthcoming EGM of Warisan.

Background Facts

The petitioners in support of their application have adduced factual circumstances and have made allegation against the respondents *inter alia* as follows:

(1) TCC is a family company which hold the controlling block of shares in four public listed companies, which are, Tan Chong Motor Holdings Berhad, Warisan TC Holdings Berhad, APM Automotive Holdings Berhad and Tan Chong International Limited, and TCC is the *de facto* majority shareholder of the said four public listed companies;

(2) TCC is a quasi-partnership. The current shareholdings on record of the petitioners' family and the first to the eight respondents' family in TCC is 45: 55 respectively;

(3) Ever since the formation of TCC until lately, all the decisions were made or taken on a consultative basis, with mutual trust and understanding being the underlying relationship in this quasi partnership;

(4) However, since 1997, the 1st and the 2nd respondents have made major decisions as regards the four listed companies without consulting and discussing with the petitioners, in particular, the 1st petitioner who is the founder of the Tan Chong Group of Companies which origins go back to 1957 when Tan Chong & Sons Motor Company was formed with shareholding restricted to the Tan Chong family members only ie, the 1st petitioner and his late younger brother;

(5) Both the petitioners and the respondents have, premised upon this quasi-partnership, a legitimate expectation to participate in the management of the Tan Chong Group of Companies;

(6) The interests of the petitioners have been disregarded by the respondents;

(7) The petitioners' participation in the management of the public listed companies in the Tan Chong Group has been marginalized;

(8) The mutual trust and confidence which existed between the petitioners and the respondents have irretrievably broken down and negotiations to get back their own respective shares failed;

(9) The 1st respondent, barely two weeks after the 1st petition filed by the petitioners was struck out, commenced his vindictive actions against the petitioners with support from the other respondents. The petitioners had on 21 May 2001 filed in a Winding-up Petition No. D2-28-507-2001 ("The 1st petition") pursuant to s. 218(1)(i) of the Companies Act 1965.

Her ladyship Zainun Ali J under the 1st petition in striking out the said petition *inter alia* stated that the petitioners had acted against the interests of TCC and its shareholders and the interests of the public company. The petitioners have appealed to the Court of Appeal against the decision of the learned judge under the 1st petition and is now pending decision (submissions were heard on 4 September 2002). The petitioners now contend that in filing this second winding-up petition it purports to contain new grounds.

(10) These actions were targeted against the 1st, 4th and 5th petitioners who hold key management positions in the Tan Chong Group. The actions of the respondents to remove and marginalize the petitioners are summarised as follows:

(i) Actions to remove the 5th petitioner by initiating action leading to a domestic inquiry purported, *inter alia*, for insubordination based on the contents of a series of "Private & Confidential" letters between the 1st respondent and the 5th petitioner.

(ii) Actions leading to the removal of the 1st petitioner, the co-founder of Tan Chong Group of Companies by way of non re-appointment to the boards of the Tan Chong Group of Public Companies to punish the 1st petitioner for filing in a winding-up petition.

(iii) Actions leading to the removal by way of their non-reappointment of the 4th petitioner and Tan Bee Huat (the 1st petitioner's daughter) from the boards of subsidiaries in Warisan group.

(11) The loss of the business in Shiseido distributorship and its temporary extension for one year upon appeal is cause for alarm for the shareholders of Warisan. An EGM has been fixed for 8 November 2002.

(12) The events leading to the loss of the Shiseido distributorship are summarised as follows:

(a) the removal of the 4th petitioner as Chairman of the subsidiary handling the Shiseido distributorship, Tung Pao Sdn Bhd in October 2000. An injunction was procured and the matter settled out of court, and the 4th petitioner was re-instated.

(b) Harassment of the 4th petitioner and Tan Bee Huat by conducting four audits in five months to uncover any irregularity attributable to them.

(c) Attempts to expand the boards of the subsidiary of Warisan where the 4th petitioner and Tan Bee Huat are members to marginalize them in the management.

(d) Disregarding the interests and concerns of Shiseido Japan, the principal who have developed a strong personal and professional relationship with both the 4th petitioner and Tan Bee Hat who repeatedly endorsed and expressed their wish to continue to have the 4th petitioner and Tan Bee Huat to lead the Shiseido team in Malaysia.

(e) Deteriorating the relationship between Shiseido Japan and Tung Pao Sdn Bhd by failing to attend 4 pre-scheduled meetings with the principal, when the principal were seeking re-assurance and *status quo* of continuity in the Shiseido business in Malaysia.

(f) The 1st respondent as Chairman of Warisan, stating at a board meeting of Warisan that, "if, in the interest of the Company (Warisan) the board was unable to accede to the principals' demands or requirements, then the Board should not comply. The board would have to accept responsibilities of such decisions made."

(g) Conspiring to replace the Shiseido brand with that of the 1st respondent's 2nd wife's cosmetics company, Misasa/Dryads Cosmetics Sdn Bhd wherein the 1st respondent chaired its management meetings in conflict and in direct competition with the Shiseido brand.

The Grant Of Two Proxies

It is the contention of the petitioners that the court is empowered to grant the order of 2 proxies pursuant to s. 149(1) of the Companies Act 1965 which allows a shareholder to appoint 2 proxies at a general meeting. Although the TCC has a discretion to appoint not more than 2 proxies the petitioners contended that its refusal to do so, invokes or does not take away this Honourable Court's jurisdiction to decide on the matter. The existence of intimidating actions against the petitioners by the 1st respondent and his family (the respondents) has confirmed the fact that the two Tan Chong families are completely at variance with each other. The learned counsel for the petitioners therefore submitted that the court ought to allow, under the circumstances, an order for 2 proxies. This would enable each family to exercise their proprietary rights in TCC freely at the forthcoming EGM of Warisan.

It is also the contention of the petitioners that the quasi partnership which was the substratum and/or the basis on which the two families conducted themselves upon mutual trust, understanding and co-operation has irretrievably broken

down. The petition filed herein is for the winding-up of the 9th respondent upon just and equitable grounds. It is just and equitable that interim relief by way of 2 proxies be granted pending trial of these issues at the petition proper as this quasi partnership *status quo* is being disregarded by the respondents.

Decision Of The Court

Having studied the affidavits filed on behalf of the petitioners and the respondents and having heard the submission made by learned counsels for the petitioners and the respondents, I hereby dismissed the petitioners' application in encl. (26) with costs on the following grounds:

I am of the view that on the issue of jurisdiction this court has no powers to grant an injunction sought for by the petitioners under a winding-up petition. I find that neither the Companies Act 1965 ("the Act") nor the Companies Winding Up Rules provide for interlocutory injunctions to be issued in the course of a winding-up proceeding. The jurisdiction of this court on a hearing of a winding-up petition to make an interim or other ancillary orders is governed by the provisions of s. 221 of the Act. The relevant part of s. 221(1) of the Act states as follows:

> On hearing a winding-up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other orders it thinks fit ...

In my view the power given to this court if at all to make an interim or other orders is limited to making ancillary orders in furtherance of or otherwise in connection with a winding-up order. It does not empower the court to order some remedy other than winding-up (See the case of *See Teow Guan & Ors. v. Kian Joo Holdings Sdn Bhd* [1997] 2 CLJ 299). As rightly pointed out by his lordship Gopal Sri Ram JCA in the above mentioned *See Teow Guan's* case, in an application under s. 221(1) of the Act the court may certainly make interim orders such as appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition. However in the present case it is noted that the orders sought for by the petitioners in encl. (26) are not in any way whatsoever related to the prospective winding-up of TCC.

It is also to be noted that the petitioners have filed a winding-up petition herein to wind-up TCC on the just and equitable ground. This is not a writ action. The petitioners have now however also applied for injunctive reliefs and have under this application in encl. (26) claimed for "an injunction for split proxies". However the provisions in respect of application for interlocutory injunctions are governed by O. 29 of the Rules of High Court 1980. I am of the view that since the application in encl. (26) is filed under the winding-up petition

only the provisions of the Act should apply and the provisions of the Rules of High Court 1980 are *prima facie* not applicable. I further take the view that O. 29 r. 1 of the High Court 1980 may not be applicable to a winding-up petition, particularly in view of the wordings of O. 29 r. 2 which do not include reference to a petition. Hence on the above mentioned grounds of lack of jurisdiction and the wrong mode of commencing an action alone the petitioners application should be dismissed *in limine*.

Even assuming this court has the jurisdiction to consider the petitioners application in encl. (26) I would still dismiss the said application. Applying the test and the principles for the granting of an interlocutory injunction as laid down in the case of *American Cynamid Co. v. Ethicon Ltd* [1975] 1 All ER 504 and the local case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 it is my finding that the petitioners have not raised *bona fide* serious issues to be tried. Looking at the nature of the orders prayed for in the petitioners application in encl. (26) it does not show that it relates to the winding-up petition of TCC. The complaint made by the petitioners does not relate to TCC at all. The company being complained of is Warisan which is a public listed company in which TCC owns 42% of the shares. Warisan is also not a subsidiary of TCC. The petitioners are filing the petition only in their capacity as shareholders of TCC.

As regards the contention of the petitioners that TCC is a quasi partnership and there is some fundamental understanding amongst the shareholders of TCC as to their rights to participate in the management of public listed companies in which TCC is a member which fundamental right has been breached by the respondents, I am of the view that the remedy for the petitioners is to wind-up TCC. The court at this stage should not compel specific performance of such fundamental understanding between the shareholders of TCC, if any, which has not been proven yet because the winding-up petition in this case has not been heard. The issue as to whether or not a member of a public listed company can ever have a legitimate expectation to participate in the management of that company has been dealt with conclusively and determined by our Court of Appeal in the case of *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals* [1996] 1 CLJ 393. In that case the Court of Appeal struck out as disclosing no cause of action a s. 181 petition wherein a shareholder of a public listed company asserted a right or expectation to participate in the management of the company in the absence of any express agreement amongst the shareholders to that effect. His lordship Mahadev Shankar JCA in delivering the judgment of the Court of Appeal in that case on this point at p. 417-418 had this to say:

> ... There is no reported decision where, in the absence of either a fundamental understanding or an express contract to that effect embodied in the articles or otherwise, a court has upheld a claim to a legitimate expectation to participation in the management of a public company by way of a permanent seat on the board of directors; and the critical reason for its absence is that the aggrieved shareholder can sell his shares, so take out his stake and go elsewhere. In quasi-partnership cases where such a right of participation has been recognised as a legitimate expectation, the remedy for its breach was not specific performance by compelling the hostile factions to continue in double-harness, but to wind-up ...

Based on the principles enunciated in the above mentioned *Leong Hup Holdings Bhd*'s case and in the circumstances of this case I arn of the view that no shareholder of Warisan can assert against the company any legitimate expectation to participate in the management of the company. If TCC as a shareholder can assert no such right against Warisan, the shareholders of TCC including the petitioners can definitely assert no such right. The allegation that the petitioners' rights to participate in the management of the Warisan group of companies have been denied to them by Warisan, allegedly used as a mere "corporate instrument" by Tan Heng Chew, the 1st respondent even if true, (which have been denied by the respondents) in my considered view can give rise to no basis for split proxies to be issued.

Even if the petitioners are said to have raised triable issues I still find that the main thrust of the petitioners' claim for an injunction is that they want to change the Board of Directors of Warisan as they believe that the business of the so-called Shiseido franchise can only be saved by them. On this issue 1 find that the petitioners have failed to show that they will suffer an irreparable harm if they do not obtain the injunction and that damages would not be an adequate remedy. On this point I find on the other hand the respondents have shown that Shiseido has already renewed the franchise. Furthermore the respondents have shown the Shiseido franchise is just one of the several businesses operated by Warisan and that Warisan has substantial operations apart from Shiseido franchise. The petitioners will not suffer any direct loss even if the Shiseido franchise is lost.

On balance of convenience, I am of the view that it tilts more in favour of the respondents for this court not to grant the injuctive reliefs sought for by the petitioners. The balance of convenience to my mind would be to maintain the *status quo* prior to the filing of the petition as regards TCC's right to issue proxies in accordance with the will of its majority shareholders and directors. This court should not be made to be seen to be interfering or involved in the management decision of a company if such decisions are made in accordance

with the law and in accordance with the Articles and Memorandum of Association of the said company. I would conclude by reiterating the observations made by the court in the Canadian case of *Re R. J. Jowsey Mining Co. Ltd.* [1969] 2 OR 549 where the court therein dealt with the scope of s. 258 of the Corporations Act (which is in *pari materia* with our s. 221(1) of the Companies Act 1965) and *inter alia* had this to say: "any possibility of the court becoming a superior board of directors (of TCC and Parasand Ltd in this case) should be avoided."